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C O N F I D E N T I A L SECTION 01 OF 03 MANILA 000307

SIPDIS

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TAGS: [PREL](#) [MARR](#) [KCRM](#) [CASC](#) [RP](#)
SUBJECT: SUPREME COURT UPHOLDS VFA, BUT RULES MARINE LCPL
SMITH SHOULD BE IN PHILIPPINE CUSTODY

REF: MANILA 246 (SUPREME COURT POISED TO RULE ON
CONSTITUTIONALITY OF VFA)

Classified By: Acting Deputy Chief of Mission Larry L. Memmott, for reasons 1.4 (b) and (d).

11. (C) SUMMARY. The Philippine Supreme Court ruled February 11 that the Visiting Forces Agreement, which governs the presence of U.S. military personnel in the Philippines, is constitutional. However, it also ruled that an agreement between the Ambassador and the Secretary of Foreign Affairs that permitted U.S. Marine Lance Corporal Daniel J. Smith to be transferred to U.S. custody after his December 2006 conviction for rape was contrary to the VFA. The court decision states that under the VFA, Smith should have been detained by Philippine authorities after his conviction and orders the Philippine government to "forthwith negotiate with U.S. representatives for appropriate agreement on detention facilities under Philippine authorities." The decision states clearly that for the time being, the status quo will prevail and Smith should remain in U.S. custody until negotiations on mutually acceptable detention facilities are completed. The Supreme Court also directed the Court of Appeals, which is considering Smith's appeal of the December 2006 guilty verdict, to resolve the case without further delay.

12. (C) The Ambassador and senior mission members reached out to Philippine government officials, who were clearly surprised by the custody verdict. A top Cabinet official told the Ambassador he was unaware of the ruling, and said he would raise it with President Arroyo. Senior officials at the Departments of Foreign Affairs and Interior and Local Government, who have the lead on the Visiting Forces Agreement and Smith's custody case, said that they believed the 2007 Kenney-Romulo agreement on Smith's custody was still valid, and would recommend that the Philippine Solicitor General file a motion for reconsideration with the Supreme Court on its finding on Smith's detention. Given the intense press and public attention the Smith case has engendered, Mission requested that the Philippine National Police increase its presence around the Embassy in case of demonstrations. We also posted a brief press statement in response to local press queries (guidance attached in paras. 10-11) Mission will continue to sound out senior Philippine officials to ascertain the government's response to the court decision, with the Ambassador slated to meet Foreign Secretary Romulo February 11, and reiterate that LCPL Smith will remain in USG custody until a mutually acceptable resolution is reached. END SUMMARY.

BACKGROUND

13. (C) U.S. Marine Lance Corporal Daniel J. Smith was

convicted by a Philippine trial court in December 2006 of raping a Filipino woman at Subic Bay and was sentenced to a maximum of 40 years in prison. Smith's appeal of the conviction has been pending before the Court of Appeals since October 2007. Separate from the criminal case, the Supreme Court heard oral arguments September 19, 2008, regarding whether the Philippine government erred in transferring Smith to U.S. custody after the trial court found him guilty. Under the interpretation of the Visiting Forces Agreement (VFA) shared by the U.S. and Philippine governments, Smith was in U.S. custody on Chancery grounds from his arrest in November 2005 until his December 2006 conviction.

¶4. (C) Upon the December 2006 trial court judge's decision convicting Smith and ordering that he be immediately transferred to Philippine facilities, the Philippine National Police took custody of Smith, transporting him over the Mission's objections to a Philippine jail. The Mission strenuously argued with Philippine government officials that the judge's order violated the Visiting Forces Agreement (VFA), which provides the sole framework for U.S.-Philippine cooperation on legal issues involving U.S. military personnel in the Philippines, and would strain a very productive bilateral relationship. The VFA provides that "custody" of a defendant will remain with the U.S. "until completion of all judicial proceedings," which the Philippine government and U.S. Mission agree includes any appeal process. After weeks of intense negotiations, on December 19, 2006, Secretary of Foreign Affairs Romulo and the Ambassador signed an agreement transferring custody of Smith to the U.S. Mission. Smith has been in U.S. custody continuously since that time. Several petitioners, including various leftist organizations, filed

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petitions contesting Smith's transfer to U.S. custody, alleging that the Visiting Forces Agreement was unconstitutional. The petitions wound their way through the courts and were consolidated in the present case before the Supreme Court.

SUPREME COURT RULES VFA CONSTITUTIONAL

¶5. (C) On February 11, in a 9-4 decision, with two justices abstaining, the Supreme Court:

- Upheld the constitutionality of the VFA;
- Found that the Romulo-Kenney agreement giving custody of Smith to the United States was not in accord with the VFA;
- Directed that the Secretary of Foreign Affairs "forthwith negotiate" with the U.S. for an "appropriate agreement on detention facilities under Philippine authorities as provided in article V, section 10 of the VFA, pending which the status quo shall be maintained until further orders by this Court";
- Retained jurisdiction in the case and may claim the right to review any agreement negotiated by Department of Foreign Affairs (DFA) and U.S. to verify it is in accordance with the constitutionally valid VFA;
- Imposed no specific timetable for the negotiation;
- Interpreted the VFA to mean that "custody" turns into "detention" upon conviction; the decision does not address the argument that custody lasts "until the end of judicial proceedings" and does not define "end of judicial proceedings";
- Directed the Court of Appeals to resolve without delay Smith's appeal of his conviction;
- Repeatedly referred to the U.S. having "faithfully" complied with the VFA;

Four justices dissented from the opinion, saying that the VFA was unconstitutional, with Chief Justice Puno calling the agreement a "slur on our sovereignty (which) cannot continue."

GOVERNMENT RESPONSE

¶6. (C) The Ambassador and senior mission members reached out to key Philippine government officials, who were clearly surprised by the verdict. Philippine Cabinet Executive Secretary Eduardo Ermita told the Ambassador that he was unaware that the decision had been promulgated or that it called for a negotiation of Smith's transfer to Philippine detention. However, he advised the Ambassador that he was currently meeting with President Arroyo and he intended to raise the matter with her. The Ambassador is slated to have a private meeting with Foreign Secretary Alberto Romulo February 12 to discuss this and other key issues.

¶7. (C) The immediate reactions of senior officials at the DFA and the Department of Interior and Local Government (DILG), who have the lead on the VFA and Smith's custody case, indicated they believed the 2007 Kenney-Romulo agreement on Smith's custody was still valid, and would recommend that the Philippine Solicitor General appeal the Supreme Court's finding regarding Smith's detention. DFA U/S Edilberto Adan, who heads the Philippine VFA commission and has been a reliable defender of the VFA, said that he believed the Philippine and U.S. governments had a shared consensus that Smith should remain in U.S. custody until the conclusion of all judicial proceedings, including appeals up to and through the Supreme Court. He said he would support a recommendation that the Solicitor General ask the Supreme Court to reconsider its decision on Smith's detention. DILG U/S Marius Corpus mirrored Adan's views.

¶8. (C) Acting A/S Lori Yparraguirre, head of American Affairs at the Department of Foreign Affairs who is close to Foreign Secretary Romulo, was more measured in her response, saying that DFA was working on a public statement on the Supreme Court decision that she hoped would be neutral in tone, so as not to hinder the government's room for maneuver. However, she did not echo the stronger comments of the two under secretaries.

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SECURITY MEASURES, PRESS STATEMENT

¶9. (C) Given the intense press and public attention the Smith case has engendered, Mission requested that the Philippine National Police increase its presence around the Embassy in case of demonstrations. Post is prepared for possible vocal demonstrations at or near the U.S. Embassy with related media coverage.

¶10. (U) In response to numerous media queries, the Embassy issued a brief statement February 11 as follows:

Philippine Supreme Court Decision on Visiting Forces Agreement

The U.S. Embassy has taken note of the Supreme Court decision regarding the Visiting Forces Agreement (VFA). As it concerns important legal issues, we have referred it to United States legal experts in Washington.

¶11. (U) The following if-asked guidance was also prepared:

-- The Visiting Forces Agreement (VFA) has provided the sole framework for U.S.-Philippine cooperation on legal cases involving visiting U.S. military personnel.

If asked about whereabouts of Daniel Smith:

-- Daniel Smith remains in confinement on the grounds of the main U.S. Embassy compound.

COMMENT

¶12. (C) While the Supreme Court decision clearly revalidates the constitutionality of the VFA, it also provides a new -- and problematic -- interpretation of the custody provisions of the VFA. The Ambassador will continue to reach out to key Philippine officials, including Foreign Secretary Romulo on Feb. 11, to ascertain Philippine government views and next steps, and discuss the implications of the decision, not only for Smith but for other current and future American military personnel. At this time, however, Post does not anticipate any immediate government demands for the transfer of Smith to Philippine custody, and will underscore that LCPL Smith will remain in U.S. custody until a mutually acceptable resolution is found to the issue of custody for defendants under the VFA.
KENNEY